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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 572

PRUDENCE REALIZATION CORPORATION,
Petitioner,

v.

GEORGE E. EDDY, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner Prudence Realization Corporation respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on December 8, 1947, reversing four orders of the Bankruptcy Court relating to the distribution of collateral securing bonds modified by plans of reorganization confirmed in 1938.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is not yet reported but is printed in the Record at pages 614-623.

The opinions of the District Court are unreported but are printed at R. 22-27, 479.

The Report of the Special Master is also unreported but is printed at R. 28-72.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on December 8, 1947 (R. 623). Petitions for rehearing filed in that Court by the petitioner and by Reconstruction Finance Corporation were denied on January 5, 1948 (R. 650). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C., Sec. 347(a), and Section 24(c) of the Bankruptcy Act, as amended, 11 U. S. C. Sec. 47(c).

Questions.[1]

1. Would the plans of reorganization here involved violate Section 77B of the Bankruptcy Act if the holders of Publicly-Held Bonds, as lienors upon the collateral, did not retain unimpaired their claim to full interest at the original rates borne by the bonds.

2. Was the order directing the transfer of the property dealt with by the confirmed Plans and approving the Supplemental Trust Agreement, from which no appeal was taken, *res judicata* on all matters determined thereby which were involved in the decision of the Court below.

3. Was such order required to be given final and conclusive effect on the appeals before the Court below.

4. Was the Bankruptcy Court without power to make such order if it was in error in decreeing therein that

[1] An additional question which will be urged in the argument on the merits is whether or not the court erred in failing to apply the provisions of sec. 77B(h) of the Bankruptcy Act.

changes from the Plans, contained in the Supplemental Trust Agreement, were not materially adverse to the interests of bondholders.

5. Were the provisions of such order and of the Supplemental Trust Agreement properly applied by the Court below.

6. Does a Bankruptcy Court's earlier ruling that changes from a confirmed Plan, contained in a trust agreement approved by such Court to carry out the Plan, are not materially adverse to the interests of creditors, require that such trust agreement, on an appeal from a later order, be interpreted so as to conform to the Plan as construed by the appellate court on such appeal, where such interpretation conflicts with provisions of the trust agreement and the construction of the Plan by the appellate court is in conflict with that of the Judge who made the earlier ruling and who also made the order appealed from.

Statute Involved.

The pertinent provisions of the Bankruptcy Act, as amended, are found in Appendix A, *infra*, pages 20 to 24.

Statement.

In proceedings for the reorganization of Prudence-Bonds Corporation under Section 77B of the Bankruptcy Act, the Plan of Reorganization was confirmed in 1938 (R. 114).

The Plan of Reorganization.

Under the Plan, the Debtor having been found to be insolvent (R. 110), a new corporation owned beneficially by the bondholders, was set up in 1938, and has been operating

since that time (R. 566). This Corporation was also named Prudence-Bonds Corporation (R. 566) and is herein called the "New Corporation".

Under the Plan there were reorganized 18 Series of secured bonds of the Debtor[2] (R. 114-115), aggregating approximately $56,000,000, and held by approximately 30,000 persons (R. 109). Approximately $41,000,000 principal amount of these bonds have heretofore been retired under the Plan and Supplemental Trust Agreement securing them, as such documents were construed by the Bankruptcy Court in 1938, leaving outstanding approximately $15,000,000, including $1,910,300 of subordinated bonds (R. 450-476. See also Appendix B hereto).

Each Series of bonds continued to be secured by its own collateral, under a separate Supplemental Trust Agreement.[3] Maturity of the bonds was extended to 1945, or conditionally to 1950 (R. 164), and on liquidation, if the collateral of any Series was more than sufficient to cover the bonds of that Series, the excess was to be applied toward the payment of bonds of other Series (R. 155). At the time the Plan was confirmed, the collateral in each Series was worth less than the amount due on the bonds in the respective Series (R. 110), and there was no way of ascertaining how much the collateral in any Series would ultimately bring on liquidation. The purpose of this pro-

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[2] Actually, here there was a separate plan for each Series, all substantially identical, integrated with a general plan covering all Series. In this statement all of these plans have been referred to as the "Plan". The separate plan for the Fifth Series appears at R. 163-184 and the Amended General Plan appears at R. 149-161.

[3] As the Supplemental Trust Agreements for the separate Series are substantially identical, they are here referred to as the "Supplemental Trust Agreement". The one covering the Fifth Series appears at R. 315-406.

vision for the reciprocal exchange of surplus collateral among the 18 Series was to afford a greater opportunity to bondholders of all Series to recover their investment; the Series which turned out to be good could help the poorer ones (R. 261-262).

The Debtor's property was transferred to the New Corporation free and clear of all claims except the claims of the holders of the bonds as modified (R. 44-46, 117). The net income of the New Corporation, as distinguished from the net income on the collateral, was applicable *pro rata* to retire bonds of all Series (R. 366), and the New Corporation assumed payment of the principal (R. 154, 325) and interest on the bonds as modified (R. 164, 325, 336, 337, 359).

Admittedly, as against the New Corporation, the old bonds became Income Bonds, i.e., they were entitled to 5½% interest, but only to the extent that the interest was earned by the collateral. The plan nowhere mentioned any further or additional interest and no mention of any lien therefor was made in the order confirming the Plan or in the order directing the transfer of the property dealt with by the Plan. No appeals were taken from either of these orders.

The Court of Appeals held here, however, that as lienors against the collateral, the bonds were not converted to income bonds, but retained unimpaired their claim to full interest. It is our contention that this decision flowed from erroneous conclusions of law and should be reviewed here.[4]

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[4] The decision frankly indicates the belief of the Court of Appeals that the decision was compelled by what we shall demonstrate to be erroneous concepts of the bankruptcy law, i.e., (1) that the Plan here involved would be illegal unless it provided that the Publicly-Held Bonds, as lienors upon the collateral, retained unimpaired their claim to full interest at the original rates borne by the bonds (R. 617-18); (2) that the Bankruptcy Court was without power to make the order approving the Supplemental Trust Agreement unless such agreement provided that the priority of the Publicly-Held Bonds still included the right to recover full

Dispute as to Guarantor's Bonds.

The bonds had been guaranteed by Petitioner's predecessor (R. 109). Petitioner owns an aggregate of $1,910,300 face amount of bonds of the various Series (R. 111), the remainder being publicly held (R. 110).

In the course of the reorganization, a dispute arose as to whether the bonds owned by the guarantor, petitioner's predecessor, should share equally with the publicly held bonds. The Plan reserved this dispute by providing with respect to the bonds in each series owned by the guarantor that if, as a matter of law, such bonds were "in respect of the right to participate in the proceeds of the Collateral" subordinate to Publicly-Held Bonds, they should not in each particular series be the subject "of purchase, retirement or redemption under the provisions of the Retirement Fund, nor be entitled to receive any distributions on account of principal until all of the Publicly-Held Bonds have been fully paid, redeemed, purchased or retired," and further that such bonds "shall be entitled to receive such subordinate treatment in respect of interest to which they may be legally entitled" (R. 178-179).

After the Plan had been recommended for approval by the Special Master, the District Court decreed that the bonds owned by Petitioner's predecessor, the guarantor, should be subordinated in each Series to the Publicly-Held Bonds of that Series, *i.e.*, they were not entitled to payment

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interest at the original rates, before any payment on junior liens; (R. 621), and (3) that the provisions of the order of the Bankruptcy Court in approving the Supplemental Trust Agreement, that changes from the Plans contained therein were not "materially adverse" to creditors, required it now to interpret the Agreement so as to conform to the construction of the Plans now made by the Circuit Court of Appeals (R. 621-23).

until the Publicly-Held Bonds of the particular Series were "paid or provided for in full, both as to principal and interest, heretofore accrued or hereafter accruing" (R. 32-34). While Petitioner's appeal from this decision was pending, this and other disputes between the Publicly-Held Bonds and the guarantor were compromised (R. 34). On such compromise, the guarantor agreed to accept, in each Series, subordination of its bonds in such Series as defined in the decree of the District Court and in the Plan. The guarantor also withdrew approximately $9,000,000 of other claims, and consented to the dismissal of the aforesaid appeal. On this compromise the guarantor received $150,000[5] (R. 34, 250).

The Supplemental Trust Agreement.

In consummation of the Plan, the Supplemental Trust Agreement was executed in 1938 (R. 315, 396, 397). In approving this Agreement as complying with the Plan, the Bankruptcy Court found that any changes from the confirmed Plan, contained therein, were not materially adverse to bondholders (R. 664). No appeal was taken from this order.

The Supplemental Trust Agreements provided that on maturity, any right to back interest not earned would be void and of no effect; and that the subordinated bonds should not receive principal or interest until the Publicly-

[5] The claims of the public bondholders against the Guarantor upon its guaranty were in no way impaired or released by this compromise or by the Plan. Those claims were allowed in full and reorganized in the Guarantor's own reorganization proceeding, and the bondholders have heretofore received and will hereafter receive dividends on those claims (R. 188-189). Indeed, a substantial part of anything recovered on the Subordinated Bonds or any other asset of the Guarantor will go to the bondholders as dividends on their claims under the guaranty. The petitioner represents over 30,000 creditors of the Guarantor whose interests are adversely affected by the decision of the Court of Appeals.

Held Bonds have been "fully paid, purchased or retired by the Corporation." In another place the Agreement provided that the petitioner's bonds "shall not be entitled to share in the Collateral until all other Bonds have been paid or provided for in full according to their tenor" (R. 337-338). The word "Bonds" is defined in the Agreement to mean the bonds as modified by the Plans and the Agreement (R. 323). The Agreement also provided that, in the event of default and sale of the collateral by the Trustee, the net proceeds in each Series after payment of the principal of the Publicly-Held Bonds of the Series, should be applied to the payment of the principal of the subordinated bonds of that Series, with any balance distributable among the other Series (R. 373).

The Present Litigation.

In the case of the Fifth Series of the bonds, the earnings of the collateral have been insufficient to pay the full 5½% interest annually, and, in accordance with the Plan of Reorganization and the Supplemental Trust Agreement, only such interest as was earned was paid (R. 53). The collateral, however, as liquidated, is more than sufficient to pay the principal of the Publicly-Held Bonds (R. 69). It was the contention of the holders of Publicly Owned Bonds in the Fifth Series that even though the arrearages of interest are not due and payable from the New Corporation, they are, nevertheless, a lien upon and may be collected out of the surplus collateral, prior to the payment of the subordinated bonds in the Series, and prior to the application of the remaining surplus [illegible] other Series of bonds. If this lien is permitted, there [illegible] insufficient funds even to satisfy the lien (R. 69).[6]

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[6] The same controversy arose as to several other Series and is involved here.

The Special Master and the District Judge (both of whom had previously passed upon all phases of the reorganization) held that the bonds as modified were Income Bonds on which interest was payable only out of net income on the collateral securing the bonds. The District Court ordered that all net income on the collateral should be paid as interest on the Publicly-Held Modified Bonds in the respective Series; that the principal of the collateral in each Series should first be applied to the payment of the principal of the Publicly-Held Bonds in such Series; and that any surplus collateral remaining after payment of the principal of the Publicly-Held Bonds should be applied to the payment of the principal of the subordinated bonds, and then to the payment of the principal of the other Series of bonds.

The Court of Appeals reversed, holding, first, that as a matter of law the plan of reorganization could not legally deprive the Publicly-Held Bonds, as senior creditors, of their right to a lien upon the collateral for the full amount of the fixed interest to the extended date of maturity, at the rates originally borne by the bonds; second, that therefore the Plan of Reorganization must be construed so as to preserve the lien of the bonds upon the collateral owned by the New Corporation for such arrearages of interest, even though such arrearages were not an obligation of the New Corporation; and third, that for the same reason the Supplemental Trust Agreement must be interpreted as reaching the same result notwithstanding it "looks the other way" and notwithstanding a literal reading of the provisions thereof make it "hard to resist the construction that, after the New Company had discharged its individual promise, the Guarantor's Bonds were to begin to take" (R. 620).

It is our contention that the Court of Appeals has demonstrably erred on each of these grounds; that its

decision is based upon the erroneous fundamental premise that the Plan of Reorganization would be illegal unless it preserved the full lien for interest; that this fundamental error led the Court of Appeals to ignore the plain language of the Plan and of the Agreement and to refuse to apply a construction of these documents made nine years ago by the same Judge who made the orders which the Court of Appeals has now reversed.

We contend that the decision of the Court of Appeals, because of these errors, conflicts with decisions of this Court and of other Circuit Courts of Appeals.

Specification of Errors to Be Urged.

The Court below erred

(1) in holding that the owners of Publicly-Held Bonds, as lienors upon the collateral, retained unimpaired their claim to full interest at the original rates borne by the bonds;

(2) in holding that the Plans, unless so construed, would be illegal;

(3) in failing to hold that the owners of Publicly-Held Bonds, as lienors, were as much limited, with respect to interest, to the income from the collateral as they were as obligees of the New Corporation;

(4) in holding that the Bankruptcy Court was without power to make the order approving the Supplemental Trust Agreement unless such Agreement is interpreted to mean that the priority of the Publicly-Held Bonds still included the right to recover full interest at the original rates, before any payment on junior liens;

(5) in basing its decision on the assumption that the order approving the Supplemental Trust Agreement could

be collaterally attacked if the Bankruptcy Court had erred in decreeing therein that changes from the Plans contained in the Supplemental Trust Agreement were not materially adverse to the interests of bondholders;

(6) in holding that the ruling, made by the Bankruptcy Court in 1938, that changes from the confirmed Plans contained in the Supplemental Trust Agreement, approved by such Court to carry out the Plans, were not materially adverse to the interests of bondholders, requires such Agreement now to be interpreted so as to conform to the Plans as presently construed by the Court of Appeals, despite the fact that such interpretation is in conflict with the Agreement itself and that the present construction of the Plans by the Court of Appeals is in conflict with that of the Bankruptcy Court Judge who made the earlier ruling, and who also made the orders reversed by the decision of the Court of Appeals;

(7) in failing to hold that the order directing the transfer of the property dealt with by the Plans and approving the Supplemental Trust Agreement was *res judicata* on the questions involved in its decision;

(8) in failing to give final and conclusive effect on the appeals before it, to the provisions of the order directing the transfer of the property dealt with by the Plans and approving the Supplemental Trust Agreement;

(9) in failing to apply Section 77B(h) of the Bankruptcy Act.

Reasons for Granting the Writ.

1. The fundamental premise of the Court of Appeals here was that it would have been illegal for the Plan of Reorganization and the Supplemental Trust Agreement to

take from the Publicly-Held Bonds their full lien upon the collateral for interest, whether earned or unearned. This conclusion, which led the Court to strain to reach a contrary construction of the Plan and Agreement, conflicts with the principles of *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 130; *Consolidated Rock Co.* v. *DuBois*, 312 U. S. 510, 528-529; and *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 563.

It is true that senior creditors ordinarily must be paid in full before junior creditors may take anything. But the Court of Appeals failed to apply two corollaries to this rule, which are recognized by the cases just cited and which would permit the surrender by the Publicly-Held Bonds of their lien upon the collateral for interest not earned by it:

(a) If the senior position of a creditor is disputed, the controversy may be compromised by assigning the alleged senior creditor less than full seniority. *Case* v. *Los Angeles Lumber Co., supra.* That was the situation here. The Publicly-Held Bonds were not adjudicated to be superior to petitioner's bonds by a court of final jurisdiction, but attained that position as a result of a compromise not only of the controverted issue of priority, but also of other disputes (including the surrender by petitioner of approximately $9,000,000 in claims against the debtor). Hence the degree of priority of the Publicly-Held Bonds was not required to be, as the Court of Appeals thought, the full extent of their claim. And a fair construction of the Plan, uninfluenced by this erroneous belief, must lead to a contrary result, as hereinafter demonstrated.

(b) The lien of a secured creditor may be cancelled or transferred, provided the creditor receives compensation for his sacrifice. *Group of Investors* v. *Milwaukee R. Co., supra.* This consideration also was present here. The emphasis in the

> Plan was upon conserving principal and securing as great a return of principal as possible. Accordingly, each Series of Bonds gave up its right to fixed interest and became income bonds. As compensation, the bonds secured, first, the right to share in the surplus collateral of each of the other Series over what was necessary to pay the principal and earned interest of that Series; second, the right to share in the income of the New Corporation (apart from the income of the collateral); and third, beneficial ownership of the stock of the New Corporation. Therefore, since the Publicly-Held Bonds received this compensation, they could legally, and did, give up their right to a lien for fixed interest.

Thus, the decision here is in conflict with the authoritative rulings of this Court, just cited, since the decision prevents the Plan from having modified the interest rights of the Publicly-Held Bonds in a manner which was intended and which those cases permit.

2. The erroneous premise of the Court of Appeals that it was illegal to take away the full lien for interest of the Publicly-Held Bonds led the Court to ignore the plain language of the Plan and of the Agreement, and to amend them in material respects some nine years after they were confirmed and approved by the District Court. The decision, in this disregard for settled principles of *res judicata*, conflicts with the decisions of this Court in *Stoll* v. *Gottlieb*, 305 U. S. 165; *Chicot County Drainage District* v. *Baxter*, 308 U. S. 371; *Prudence Realization Corp.* v. *Ferris*, 323 U. S. 650, 654-655; *Duggan* v. *Sansberry*, 327 U. S. 499, and with the decisions of other Circuit Courts of Appeals in *In re Diversey Building Corp.*, 148 F. (2d) 65 (C. C. A. 7); *In re Irving Austin Bldg. Corp.*, 96 F. (2d) 905 (C. C. A.

7); *In re Higbee Company,* F. (2d) , C. C. H. Bankruptcy Law Reports, ¶56,016, decided December 2, 1947 (C. C. A. 6).

The Court of Appeals reached the anomalous result that the Publicly-Held Bonds were income bonds as to the New Corporation, but entitled to a lien for their full interest as to the collateral owned by the New Corporation. At R. 618-19 the Court considered what purposes this disparity could serve. It will be noted that this discussion is couched in terms of sheer speculation,—and the record itself shows these purposes to be erroneous.[7]

The Court of Appeals sought to support its conclusion that under the Plan the bonds retained their lien as to all interest by reference to language that the subordinated bonds should receive nothing until the Publicly-Held Bonds were "fully paid". But paragraph 3 of the Plan (R. 164)

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[7] A supposed purpose, as stated by the Court of Appeals, was

> "The due date of each series was 1945, but in each a majority of the Publicly-Held Bonds, if they wished, might extend the maturity to 1950; and it was possible that some of the series might do so, and some might not. If the New Company were to be liable for any deficiency in interest upon the Publicly-Held Bonds in a series which became due in 1945, the bondholders in that series would be able to take judgment and execution against it, and that would, or at least it might, put an end to any further efforts to conserve the collateral of those series which were to last five years longer" (R. 619).

If any such purpose existed, the Special Master and the District Judge, both of whom have participated in this reorganization since its inception, surely would have been aware of it, and hardly could have reached their decision that these were income bonds as to their lien as well as to the New Corporation.

But such a purpose could not exist. The Court mistakenly relied on only one (R. 164) of two pertinent provisions relating to the extension of the bonds. The other provided that if all Series did not agree to extend, the bonds of all Series which had extended would mature 30 days from May 1, 1945, unless prior to that time the New Corporation paid off the bonds which were not so extended (R. 176-177).

states unequivocally that "the Modified Bonds are to bear interest at the rate of 5½% per annum, *if and only* to the extent that the annual collections of net income received from the collateral after the Effective Date will suffice to pay such interest." (Emphasis added.) It is apparent that these bonds are "fully paid" as to interest when they receive the only interest to which this article entitles them, i.e., the earned interest.

That this is the only permissible meaning of this phrase is amply supported by the clear language of the Supplemental Trust Agreement. Even the Court of Appeals admitted that the Agreement "looks the other way" from the Court's conclusion, so that a contrary result was "hard to resist" (R. 620).

The Court of Appeals in this aspect pointed to §10 of Article II of the Agreement, providing that the guarantor's bonds should be paid after the Publicly-Held Bonds were "fully paid, purchased or retired by the [New] Corporation"; thus the rights of the Publicly-Held Bonds went no further than the obligation of the New Corporation. The Court of Appeals indeed ignored other strong language of the Agreement contrary to its conclusion: e.g., §8, Article II (R. 337), provides that on maturity "any deficiency or deficiencies of interest . . . will not become due and will not be paid by the Corporation *and any right to such deficiency or deficiencies will after the final maturity date be void and of no effect.*" (Emphasis added.) Further, sections 3-10 of Article VI, relate to the rights of the Trustee upon an event of default (R. 370-375), and Section 6 of such Article provides that the net proceeds of sale of the collateral by the Trustee pursuant to its rights upon an event of default shall be applied first to the pro rata payment of the principal of the Publicly-Held Bonds of

the Series, and, if the principal of all such bonds is paid in full, then to the pro rata payment of the principal of the subordinated bonds of the Series, and that if any surplus remains it shall be distributed as principal pro rata among the remaining Series (R. 373).

The Court chose its misconstruction of the Agreement upon the following reasoning: (a) The Plan could not legally deprive bondholders of their lien for interest; (b) the District Judge could not make a "materially adverse" change in the Plan so as to deprive them of this lien without affording creditors the right to withdraw their acceptances; (c) if he did so his order was illegal and is presently subject to collateral attack; (d) since the District Judge found that the Agreement made no "materially adverse" changes in the Plan, and the Plan is *now* found *by the Court of Appeals* to have preserved the right to a lien for full interest, the Agreement must also have done so, despite its clear language to the contrary.

This reasoning is patently specious both as to the law and the facts. As demonstrated above, the modification of the interest claim of Publicly-Held bonds was proper as a matter of law. That the finding by the District Judge that the Agreement, which clearly provides that the modified bonds shall be income bonds both as to their lien and as to the obligation of the New Corporation,[8] was consistent with the Plan and made no materially adverse change in the Plan, is supported by the fact that no creditor protested this order or took an appeal from it. This reflects the unanimous opinion at the time that the Plan had already modified the bonds so as to make them true income bonds in both

[8] This agreement was recommended by the Special Master after hearings and conferences participated in by numerous counsel and committees for bondholders (R. 576).

respects, and that the Agreement was in proper form to carry out the Plan.

Indeed, if any bondholders thought that these clear provisions of the Agreement did not comply with the Plan and believed that the District Judge's finding was erroneous, their remedy was by appeal, even if, as the Court of Appeals said at R.621, the right to withdraw consents were a *condition* upon the Court's power to approve at all any change from the Plan, contained in the Supplemental Trust Agreement. So too, their remedy was by appeal if they believed the Court was in error in directing the transfer to the New Corporation of the property dealt with by the Plan, free and clear of all claims except the claims of the holders of the bonds as modified. Failure to appeal from such order rendered *res judicata* the order that the Agreement complied with the Plan and that any changes were not "materially adverse". That order clearly provided that the bonds were income bonds both as to their lien and as to their claim against the New Corporation. The Court of Appeals, however, erroneously believed that if changes from the Plan contained in the Agreement were "materially adverse", the District Court had no power to make the changes, and its decision could now be attacked collaterally. This is squarely contrary to the holding of this Court in the *Sansberry* case, *supra*.

The Court of Appeals, completely disregarding the fact that the property dealt with by the Plan was transferred to the New Corporation nine years ago, that since then bondholders have irretrievably changed their position upon the assumption that when their bonds were declared to be income bonds their rights were so limited, now, in the guise of interpretation, has thus in reality amended the Plan of Reorganization and the Supplemental Trust Agreement and has modified the order directing the transfer of

the property dealt with by the Plan. If this decision stands the principle of *res judicata* is meaningless in the Second Circuit, and the rights and obligations under a plan of reorganization can never be finally established.

3. Further, the Court of Appeals approached the issue in the case upon the mistaken assumption that this was a controversy between the Publicly-Held Bonds, on the one side, and the Subordinated Bonds, on the other (R. 615) and concluded by saying "We sustain the position of the Publicly-Held Bonds."

The effect of the decision is to frustrate the pattern of reorganization bargained for here, among the 18 Series of bonds each with numerous public bondholders. As said above, this controversy is not merely between the guarantor and the Publicly-Held Bonds; the remaining surplus, now eaten by the back interest claim, was to be distributed pro rata among the other Series of bonds. The Plan of Reorganization, as was said, was a part of a united endeavor by all Series to recoup the principal from each Series (R 261-262). The instant decision is a spoliation of the rights of those other Series and not, as stated in the opinion below, the prevention of spoliation of the bondholders of this Series. The extent of the loss by the Publicly-Held Bonds in ten of the eighteen series will be collateral having a book value of $775,000 as shown by the table in Appendix B.

In holding that, under the decision of the District Court, some of the *res* would be released and turned over to the New Corporation, constituting a spoliation of the Publicly-Held Bonds, the Court of Appeals overlooked the fact that any surplus received by the New Corporation is, by express provision of the Supplemental Trust Agreement, made "subject to the lien of the Supplemental Trust Agreements

for the remaining series'' (R. 365) and is to be applied to the payment of bonds in such Series; and if any surplus remained after all the bonds are paid, the excess would also go to the bondholders, on their holding of the stock in the New Corporation.

WHEREFORE, it is respectfully requested that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner, Prudence Realization Corporation.

APPENDIX A

NATIONAL BANKRUPTCY ACT

Section 77B

"(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise;"

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"(5) shall provide in respect of each class of creditors of which less than two thirds in amount shall accept such plan (unless the claims of such class of creditors will not be affected by the plan, or the plan makes provision for the payment of their claims in cash in full), provide adequate protection for the realization by them of the value of their interests, claims, or liens, if the property affected by such interests, claims, or liens is dealt with by the plan either as provided in the plan (a) by the transfer or sale of such property subject to such interests, claims, or liens, or by the retention of such property by the debtor subject to such interests, claims, or liens, or (b) by a sale free of such interests, claims, or liens at not less than a fair upset price and the transfer of such interests, claims, or liens to the proceeds of such sale; or (c) by appraisal and payment either in cash of the value either of such interests, claims, or liens, or, at the objecting creditors' election, of the securities allotted to such interests, claims, or liens under the plan, if any shall be so allotted; or (d) by such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection;"

• • • • • • •

"(b)(9) shall provide adequate means for the execution of the plan, which may include the transfer of all or any

part of the property of the debtor to another corporation or to other corporations, or the consolidation of the properties of the debtor with those of another corporation, or the merger or consolidation of the debtor into or with another corporation or corporations, or the retention of the property by the debtor, the distribution of assets among creditors or any class thereof, the satisfaction or modification of liens, indentures, or other similar instruments, the curing or waiver of defaults, extension of maturity dates of outstanding securities, the change in interest rates and other terms of such securities, the amendment of the charter of the debtor, and the issuance of securities of either the debtor or any such corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes;"

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"(f) After hearing such objections as may be made to the plan, the judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible; (2) it complies with the provisions of subdivision (b) of this section; (3) it has been accepted as required by the provisions of subdivision (e), clause (1) of this section; (4) the provisions of subdivision (e), clause (2), of this section have been complied with; (5) all amounts to be paid by the debtor or by any corporation or corporations acquiring the debtor's assets, and all amounts to be paid to committees or reorganization managers, whether or not by the debtor or any such corporation for services or expenses incident to the reorganization, have been fully disclosed and are reasonable, or are to be subject to the approval of the judge; (6) the offer of the plan and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by this Act; and (7) the debtor, and every other corporation, issuing securities or acquiring property under the plan, is authorized by its charter or by applicable State or Federal laws, upon confirmation of the plan, to take all action necessary to carry

out the plan, and that, in case the debtor is a utility corporation subject to the jurisdiction of a regulatory commission or commissions or other regulatory authority or authorities, created by the laws of the State or States in which the properties of the debtor are operated, all authorizations, approvals, or consents of each such commission or authority required by the laws of such State or States, have been obtained.

"Before or after a plan is confirmed, changes and modifications may be proposed therein by any party in interest and may be made with the approval of the judge after hearing upon notice to creditors and stockholders, subject to the right of any creditor or stockholder who shall previously have accepted the plan to withdraw his acceptance, within a period to be fixed by the judge and after such notice as the judge may direct, if, in the opinion of the judge, the change or modification will be materially adverse to the interest of such creditor or stockholder, and if any creditor or stockholder having such right of withdrawal shall not withdraw within such period, he shall be deemed to have accepted the plan as changed or modified: Provided, however, That the plan as changed or modified shall comply with the provisions of subdivision (b) of this section and shall have been or shall thereafter be accepted as required by the provisions of subdivision (e), clause (1), of this section, including acceptances by reason of failure to withdraw as hereinbefore provided, and the provisions of this subdivision (f), and of subdivision (e), clause (2), of this section shall have been complied with in respect thereof. Upon confirmation of the plan by the judge, the debtor and other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to put into effect and carry out the plan and the orders of the judge relative thereto.

"The provisions of subdivisions 1, 2, and 3 of schedule A of title VIII of the Revenue Act of 1926, as amended by sections 721, 722, and 723 of the Revenue Act of 1932 and

the provisions of sections 724 and 725 of the Revenue Act of 1932 shall not apply to the issuance, transfers, or exchanges of securities or making or delivery of conveyances to make effective any plan of reorganization confirmed under the provisions of this section."

* * * * * * *

"(h) Upon final confirmation of the plan, the debtor and other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and control of the judge, and the property dealt with by the plan, when transferred and conveyed by the trustee or trustees to the debtor or the other corporation or corporations provided for by the plan, or, if no trustee has been appointed when retained by the debtor pursuant to the plan or transferred by it to the other corporation or corporations provided for by the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the court may direct the trustee or trustees, or if there be no trustee, the debtor and any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may direct the debtor to join in any such transfer or conveyance made by the trustee or trustees.

"Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Such final decree shall discharge the debtor from its debts and liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan or as may be reserved as aforesaid.

"All securities issued pursuant to any plan of reorganization confirmed by the court in accordance with the provisions of this section, including, without limiting the generality of the foregoing, any securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan and securities issued by the debtor or by the trustee or trustees pursuant to subdivision (c), clause (3), of this section, and all certificates of deposit representing securities of or claims against the debtor which it is proposed to deal with under any such plan, shall be exempt from all the provisions of the Securities Act of 1933, approved May 27, 1933, except the provisions of subdivision (2) of section 12, and section 17 thereof, and except the provisions of section 24 thereof as applied to any willful violation of said section 17."

* * * * * * *

"(j) A certified copy of the final decree or of an order confirming a plan of reorganization, or of any other decree or order entered in a proceeding under this section, shall be evidence of the jurisdiction of the court, the regularity of the proceedings and the fact that the decree or order was made. A certified copy of an order directing the transfer of the property dealt with by the plan as provided in subdivision (h) of this section shall be evidence of the transfer of title accordingly, and if recorded shall impart the same notice that a deed, if recorded, would impart."

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APPENDIX B

Series	Publicly Held Bonds	Total Collateral(1)	Deficit(3)	Excess	Subordinated Bonds	Amounts Available for Subordinated Bonds and Liens if Interest Payable Only to Extent Earned	Surplus Available for Other Series After Payment of Subordinated Bonds if Interest Payable Only to Extent Earned	Record References
A	$ 278,349.00	$ 273,069.54	$ 5,279.46		$ 37,300.00	$ —0—	$ —0—	R. 450
AA	431,184.00	705,350.27		$ 274,166.27	138,100.00	138,100.00	136,066.27	R. 451
3	1,519,690.00	1,286,881.77	232,808.23		122,200.00	—0—	—0—	R. 453
4	216,104.00	162,880.52	53,223.48		21,100.00	—0—	—0—	R. 455
5	1,077,450.00	1,424,948.51		347,498.51	153,025.00(2)	153,025.00	194,473.51	R. 50–51
6	—0—	179,930.32		179,930.32	311,200.00	179,930.32	—0—	R. 458
7	455,800.00	229,202.98	226,597.02		118,500.00	—0—	—0—	R. 460
8	568,420.00	837,275.71		268,855.71	193,200.00	193,200.00	75,655.71	R. 461
9	1,452,850.00	1,914,447.92		461,597.92	193,824.98(2)	193,824.98	267,772.94	R. 583
10	476,465.00	109,201.53	367,263.47		19,000.00	—0—	—0—	R. 463
11	156,900.00	41,570.85	115,329.15		7,000.00	—0—	—0—	R. 464
12	272,896.00	526,404.71		253,508.71	390,500.00	253,508.71	—0—	R. 465
13	2,009,276.00	1,499,891.30	509,384.70		109,900.00	—0—	—0—	R. 467
14	948,800.00	768,587.33	180,212.67		70,200.00	—0—	—0—	R. 469
15	1,312,175.00	1,002,806.40	309,368.60		82,700.00	—0—	—0—	R. 471
16	1,092,157.00	515,154.62	577,002.38		2,200.00	—0—	—0—	R. 473
17	269,750.00	405,576.44		135,826.44	92,500.00	92,500.00	43,326.44	R. 475
18	651,240.00	729,998.12		78,758.12	21,800.00	21,800.00	56,958.12	R. 476
	$13,189,506.00	$12,613,178.84	$2,576,469.16	$2,000,142.00	$2,084,249.98(2)	$1,225,889.01	$774,252.99(4)	

(1) All figures for collateral are book value. Except for Fifth and Ninth Series, the figures for bonds outstanding and collateral are as of August 31, 1946.

(2) Figures for subordinated bonds in Fifth and Ninth Series include the subordinated liens of $85,825 in Fifth Series and $88,124.98 in Ninth Series, held by the former indenture trustee.

(3) In the ten Series having deficits the publicly held bonds total $8,465,716.

(4) Any of the surplus going to the Sixth and Twelfth Series would increase the amounts payable on the subordinated bonds of those Series. Part of any surplus going to Series A might be available to pay subordinated bonds in that Series.